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June 3, 2005

Brad C. Deutsch, Esq.
Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Internet Communications

Dear Mr. Deutsch:

We are counsel to John Kerry for President, Inc., and Kerry-Edwards 2004, Inc., the principal campaign committees of Senator John Kerry in his campaign for President of the United States in the 2004 election. On behalf of those committees, we write to comment on the above-referenced notice of proposed rulemaking.

I. INTRODUCTION

Since Americans began using the Internet on a mass scale during the mid-1990s, the technology has had democratizing and leveling effects on the political process. These effects were never seen more keenly than in Senator Kerry's 2004 campaign for President. Countless individuals plunged into the political process with their web sites, and with e-mails sent to their neighbors. They not only helped mobilize and organize support for Senator Kerry, but gave him a combined $82 million in contributions over the Internet. Their efforts were a democratizing force that diminished the power of large, moneyed interests, and helped make the 2004 elections among the most closely contested ever.

In recent years, the Commission has shown great care in applying the law to uses of the Internet like these. It has sent a clear signal of noninterference by showing flexibility through the advisory opinion process, by exercising careful discretion in the enforcement process, and – until now – by standing down from the rulemaking process. The results of this administrative judgment have been wholly positive.

Millions of Americans have been empowered, with no evidence of corruption as a result.

This rulemaking poses a potential departure from this path. By writing rules to say that specific applications are permitted under specific circumstances, the Commission would suggest that these rules reflect the limits of permitted activity. Moreover, the adoption of new rules would signal a shift in momentum in the enforcement process from inaction to action. These developments would have a chilling effect on the sorts of Internet uses that so dramatically affected the 2004 elections.

Such an outcome would be unfortunate, not only because of the democratic nature of the Internet, but also because Congress did not intend to create new barriers to Internet use when it passed the Bipartisan Campaign Reform Act of 2002. Moreover, the Internet has not been associated with any scandal of the sort that prompted major legislative or regulatory initiatives in the field of campaign finance, whether it was the Watergate scandals of the 1970s, the practice of corporate bundling in the 1980s, or the prevalence of soft money in the 1990s.

If post-BCRA developments require any second look at the Internet by the Commission, they involve the growing practice of fraudulent misrepresentation through e-mail and on the web. Unlike anything else that happened during the 2004 cycle, this practice poses the direct threat of silencing citizen voices.

Should Internet technologies be used to undercut the anti-corruption purpose of the law sometime in the future, the Commission could then consider action. Yet that moment has not come. Instead of writing new rules that could chill Internet activism, the Commission should instead devote its efforts toward more vigorously enforcing existing law against practices that directly endanger citizen participation.

II. DISCUSSION

A. The Kerry 2004 Experience and the Democratizing Effect of the Internet

John Kerry was the Democratic nominee for President in the 2004 general election. His 2004 campaign showed how the medium could function as a leveling force, magnifying the power of average individuals as in no election before. Senator Kerry enjoyed an unprecedented level of help from many thousands of individuals who built web pages, sent e-mails, ran blogs, formed Internet discussion groups, and otherwise

used the Internet to help elect him President. These individuals used the Internet to organize their communities for Senator Kerry – geographic, demographic and virtual.

Senator Kerry raised approximately $82 million from individuals on the Internet – more than the $50 million Al Gore raised from *all* individual contributors in 2000, and a third of his total private fundraising. Glen Justice, *Kerry Kept Money Coming With Internet as His A.T.M.,* N.Y. Times, Nov. 6, 2004, at 12. During the peak of the campaign, he raised more than $10 million a month on the Internet. Thomas B. Edsall, James V. Grimaldi and Alice R. Crites, *Redefining Democratic Fundraising,* Wash. Post, July 24, 2004, at A1.

The effect of this support was profoundly democratizing. It gave Senator Kerry critical support when he needed it most, after he clinched the Democratic nomination in spring 2004. It leveled the political process by allowing the campaign to rely on smaller contributions, rather than larger ones; to rely on the activism of thousands of ordinary Americans, rather than the deep pockets of a small few.

B. The Commission's Role in Promoting Internet Advocacy

The Commission has shown great care in applying the Federal Election Campaign Act to Internet activism. At first, the Commission applied the law to Internet applications in ways that provided little flexibility to users. *See, e.g.,* Advisory Opinion 1998-22 (issued to Leo Smith). However, later advisory opinions signaled Commission willingness to interpret the Act in a manner that would accommodate a range of Internet uses.

Notably, in Advisory Opinion 1999-17, the Commission advised President George W. Bush's first presidential campaign that existing exemptions from the definition of "contribution" and "expenditure" permitted volunteers to build web sites on their home computers to support a candidate, and even to pay the costs of registering the domain names. *See* Advisory Opinion 1999-17 at 6. It acknowledged that a campaign incurs no reporting responsibilities from Internet activities not coordinated with it, and has no "obligation to search the web" for supportive activity. *See id.* at 7. Finally, it held that the provision of a hyperlink was only a contribution when the

owner of the linking site would ordinarily charge to provide such a link. *See id.* at 7-8.[1]

Interpretations like these gave candidates and supporters great comfort that they could use the Internet in ordinary ways with minimal regulatory consequences. This comfort was especially significant for presidential campaigns, where individuals at the grassroots level are constantly active in support of their preferred candidates, and where campaigns have no practical way of policing all supporters' compliance with Commission rules.

The Commission has shown similar restraint vis-à-vis the Internet in the enforcement process, giving similar comfort to candidates and activists. For example, after issuing the guidance in Advisory Opinion 1999-17, it dismissed a complaint filed by President Bush's 2000 campaign against the sponsor of a well-publicized parody site. *See* MUR 4894. Similarly, while the Commission found reason to believe that a local anti-abortion organization had violated its rules by paying for a web site accessible to the general public that endorsed President Bush, it chose to take no action and send an admonishment letter, in part because the "costs were likely minimal." General Counsel's Report, MUR 5522, at 3.

Finally, after considering whether to adopt sweeping rules on the subject of the Internet, the Commission declined to do that. *See* Use of the Internet for Campaign Activity, 64 Fed. Reg. 60,360 (1999). The Commission first issued a Notice of Inquiry on a wide range of Internet activities. *See id.* The Commission then issued draft proposed rules that would have dealt with a far smaller range of subjects, including individual volunteer activity, hyperlinks on corporate and union sites, and publication of endorsement press releases. *See* The Internet and Federal Elections: Candidate-Related Materials on Web Sites of Individuals, Corporations and Labor Organizations, 66 Fed. Reg. 50,358 (2001). After the Commission received written comments and testimony from a number of interested parties, many of whom

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[1] *See also* Advisory Opinion 1999-9 (paving the way for the matching of Internet credit card contributions with public funds for presidential primary campaigns); Advisory Opinion 1999-36 (permitting a federal PAC to send flash videos using existing software, hardware and other overhead without triggering reportable independent expenditures); Advisory Opinion 2004-06 (allowing candidates to use Meetup.com's event planning services on the same terms and conditions available to all similarly situated persons in the general public).

counseled a permissive approach, the Commission proceeded no further in the rulemaking.

C. Concerns About the Proposed Rules

Senator Kerry co-sponsored the Bipartisan Campaign Reform Act of 2002. He supports that law and its objective of removing corruption from the political process. He believes that BCRA can and should tilt the balance of political power back toward ordinary citizens. Nonetheless, for those like Senator Kerry who strongly support giving average Americans a more effective voice in the political process, this rulemaking raises more concern than hope.

The draft rules published by the Commission for consideration are more modest in scope than some potential alternatives. However, their adoption would nonetheless have the potential to chill the sort of activism that had such a positive force in 2004. By publishing rules to define precisely the range of personal volunteer activity first acknowledged in Advisory Opinion 1999-17, the Commission would suggest that these rules represent the limits of protected activity. While this approach is perhaps understandable as a matter of administrative enforcement, it seems inapposite to "the vast democratic forums of the Internet," where the state enjoys "no basis for qualifying the level of First Amendment scrutiny." *Reno v. American Civil Liberties Union,* 521 U.S. 844, 869, 870 (1997).

Moreover, the publication of new rules inevitably creates the perception among the regulated that enforcement will follow – which in turn can heighten the chill. For example, when the Commission issued the Leo Smith advisory opinion in 1998, holding that the publication of web content was something of value and thus a contribution, *see* Advisory Opinion 1998-22, the Commission saw a flurry of advisory opinion requests, seeking approval for specific types of Internet activities. *See, e.g.,* Advisory Opinions 1999-7, 1999-17, 1999-25, 1999-24 and 1999-37. Only after the passage of time, when it became clear that the Commission was going to take a careful approach in applying its rules to Internet applications, did people feel increasingly free to use the Internet in innovative ways, without feeling that they had to ask the Commission for permission first.

It would be unfortunate if this rulemaking were to chill Internet activism. As Senator Harry Reid told the Commission in March, "Congress did not intend to regulate this new and growing medium in the Bipartisan Campaign Reform Act" – which both he and Senator Kerry co-sponsored. *See* Letter from the Honorable Harry Reid to

Chairman Scott Thomas (Mar. 16, 2005). The federal district court that invalidated the Commission's post-BCRA Internet rules did not require the Commission broadly to expand the scope of Internet regulation, and did not require the Commission to address many of the subjects now under discussion. *See* Internet Communications, 70 Fed. Reg. 16,967, 16,968-69 (2005).

Nor has the Internet been associated with the sort of scandal that would normally warrant a retooling of the campaign finance laws – as Watergate did during the 1970s, when Congress passed the bulk of the Federal Election Campaign Act; as the growing phenomenon of corporate bundling did during the 1980s, before the Commission adopted the so-called "Prudential" rules; and as the rise of "soft money" did in the 1990s, before Congress passed BCRA. Indeed, while the law requires corruption or its appearance as an essential precondition of regulation, the Internet lends itself poorly to such risks:

> Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. As the District Court found, the content on the Internet is as diverse as human thought ... We agree with its conclusion that our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.

521 U.S. at 870 (quotation marks omitted).

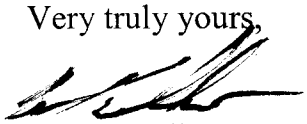
However, there was one way in which the Internet impaired the ability of average Americans to make their voice heard, and yet which went completely undiscussed in the Notice of Proposed Rulemaking. During 2004, Senator Kerry's campaign faced a number of instances in which it was the victim of fraudulent electronic mail and web site solicitations. Such instances prompted the campaign to file complaints with the Commission. For example, in April 2004, the campaign discovered a website that extensively copied Senator Kerry's website. It falsely stated that it was "paid for and authorized by John Kerry for President, Inc." It had a contribution page, at which users were encouraged to contribute; the contributions did not go to the Kerry campaign. In June 2004, a website based in Denmark copied the campaign's contribution page in its entirety. In July 2004, a fake copy of a campaign e-mail solicitation was sent. However, the contribution link in the e-mail linked to another website.

Despite the campaign's prompt complaints, the FEC's enforcement system appears ill-suited to take prompt action on such complaints. It is such fraud that serves as the biggest threat the Internet poses to the political power of average Americans. If individual voices can be diminished by the concentration of economic power, they can be silenced altogether when those individuals discover that their credit card information has been fraudulently captured, or that the contributions they thought they were making to a candidate went to someone else.

Current law already prohibits this conduct. *See* 2 U.S.C. § 441h. Indeed, as part of BCRA, Congress strengthened the Act's fraudulent misrepresentation statute, one of the many advances that led Senator Kerry to support that law. If the Commission is to act on the subject of the Internet, what is needed most is more aggressive enforcement of § 441h, as modified by BCRA; and effective coordination of these matters with the Department of Justice, and with other agencies that enforce non-FECA statutes prohibiting this sort of conduct.

We appreciate the opportunity to comment, and respectfully request an opportunity to testify at the public hearing.

Very truly yours,



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